MOTION FILED

DEC 2 8 2009

No. 09-625

IN THE

Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
D/B/A HUSTLER MAGAZINE,
Petitioner,

v.

MAUREEN TOFFOLONI, AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY E. BENOIT,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

AMICUS CURIAE BRIEF OF FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Robert Corn-Revere
Counsel of Record
Ronald G. London
DAVIS WRIGHT TREMAINE LLP
Suite 200
1919 Pennsylvania Ave., NW
Washington, DC 20006
(202) 973-4200

Rochelle L. Wilcox
DAVIS WRIGHT TREMAINE LLP
Suite 2400
865 S. Figueroa St.
Los Angeles, California 90017
(213) 633-6800

Counsel for Amicus Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

MOTION FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE*

Amicus Curiae First Amendment Lawyers Association ("FALA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for petitioner has been obtained; the consent of the attorney for respondent was requested but was refused.

FALA is an Illinois not-for-profit corporation with over 180 members throughout the United States and Canada. Its members, who include the most prominent U.S. First Amendment attorneys covering virtually every state, regularly litigate various facets of the issues before this Court by consistently defending the rights to free speech and expression against governmental intrusion, and advancing sound First Amendment jurisprudence in the Courts.

Amicus believes the Eleventh Circuit decision in this action significantly erodes First Amendment freedoms, and in particular those the Constitution intends publishers of all stripes to enjoy. FALA is concerned not just because the decision below restrictively construing the nexus between news and photographs pertinent to it appears driven in significant part by the nature of the publication at issue, but because its holding implicates the degree of free speech protection all publishers enjoy to exercise editorial discretion as to what merits coverage, and how news should be illustrated.

Amicus Curiae believes that its Brief assists the Court in two respects. First, *Amicus* more fully

explicates the circuit split that is mentioned in the Petition. *Amicus* believes it is vital that the Court understand how the rule adopted by the Eleventh Circuit in this case diverges from the positions taken in other Circuits and, in particular, the Fifth Circuit Court of Appeals. Second, *Amicus* discusses the broad array of media that will be affected by the Eleventh Circuit's reasoning, so that the Court can appreciate how many different forms of media will be hindered in their ability to publish newsworthy material.

Wherefore, *Amicus* seeks to file this brief to help ensure that all publishers enjoy the full breathing space the First Amendment anticipates and requires.

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INTEREST OF *AMICUS CURIAE* [1]

Amicus Curiae First Amendment Lawyers Association ("FALA") is an Illinois not-for-profit corporation with over 180 members throughout the United States and Canada. Its members, who include the most prominent U.S. First Amendment attorneys covering virtually every state, regularly litigate various facets of the issues before this Court by consistently defending the rights to free speech and expression against governmental intrusion, and advancing sound First Amendment jurisprudence in the Courts.

SUMMARY OF ARGUMENT

This case provides the Court with a unique opportunity to resolve the question of whether a commercial interest in photographs can preclude their publication in connection with an article that is indisputably newsworthy. This case does not involve any questions of embarrassment or emotional distress arising from the publication of the photographs. Under Georgia law, any action based on such damages did not survive the death of the person depicted. Thus, this case presents the narrow question of whether the

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *Amicus Curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *Amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of petitioner to the filing of the brief has been filed with the Clerk pursuant to Sup. Ct. R. 37.2(a). Pursuant to Sup. Ct. R.. 37.2(a), respondent was advised on December 16, 2009, that *Amicus Curiae* intended to submit a brief in support of review and consent was requested, but it was refused.

First Amendment bars a claim that a publication infringes the subject's commercial right of publicity.

The Eleventh Circuit's restrictive definition of "newsworthiness" to evaluate whether Defendant's publication is entitled to the protection of the First Amendment creates different standards for publishers and other media in the United States. It exposes publishers to a significant risk of liability in the Eleventh Circuit for speech that is fully protected elsewhere. The Fifth Circuit, for example, has eschewed the judicial blue-lining embraced by the Eleventh Circuit, and holds that courts may not evaluate the elements of a protected work, to determine whether each element is entitled to the First Amendment's protection, so long as any argument can be made that the elements have some relevance to the work's topic. The Fifth Circuit thus adheres to this Court's precedents, which have made clear that in almost every case it is up to editors, not judges, to decide what true information can and should be included in an article or story. This Court should resolve the circuit split by making clear that judges may not second-guess the exercise of editorial discretion in deciding what photographs should accompany a newsworthy article.

This case is not just about *Hustler* magazine, and its holding will not affect just this single entity. Indeed, the questions presented here are of tremendous interest to the industry groups and media entities that would benefit from the Court accepting review. Every week, magazine and newspaper stands across the country publish photographs that could be described, as the Eleventh Circuit did here, as the

heart of the article. Indeed, photographs are a staple of the magazine industry and the primary component of many magazines. The burgeoning gaming industry also relies heavily on images, many reminiscent of celebrities and other public figures. These images are part of the product and courts uniformly recognize that they are entitled to the protection of the First Amendment.

The Eleventh Circuit's ruling exacerbates the disarray in the law regarding this issue. Now, media entities must adhere to the Eleventh Circuit's restrictive definition of "newsworthiness" or face liability in that circuit for speech that should be fully protected. They must censor themselves – resulting in less speech for everyone – lest a court in Birmingham, Atlanta or Gainesville decide that photographs of the subject of an article are insufficiently connected to the article. The subjective nature of this inquiry, which relies on the predispositions of the judges hearing the case, will force all media entities to publish only what is safe.

The First Amendment demands more breathing room than the Eleventh Circuit's decision will allow. This Court should grant review in this case and ensure that the protections afforded by the First Amendment are uniform throughout the circuits, and give the appropriate discretion to the editors and journalists who publish newsworthy works.

REASONS FOR GRANTING THE PETITION

A. The Eleventh Circuit's Decision Magnifies the Existing Circuit Split, Permitting Courts Broad Discretion in Deciding What Is "Newsworthy" and Entitled to First Amendment Protection.

Three times in the 1970's and again in 1989, this Court considered whether a media entity could be punished for its publication of true information. Each time, it held that the First Amendment prohibited imposing liability on defendant. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publ'g Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, the Court explained that its cases "have carefully eschewed" resolving the question of whether "truthful publication may [ever] be punished consistent with the First Amendment" because "the future may bring scenarios which prudence counsels our not resolving anticipatorily." 491 U.S. at 532 (citations omitted).

In the wake of *Florida Star*, the circuit courts have struggled to decide under what circumstances, if any, truthful publication may be punished. The question, as framed by the courts, is whether the material is "newsworthy" and therefore entitled to the protection of the First Amendment. This question typically arises in two types of invasion of privacy cases – public disclosure of private facts, and the right of publicity/commercial misappropriation. The courts have arrived at different conclusions regarding the

discretion appropriately afforded to journalists in deciding the scope of material to be disclosed.

In *Ross v. Midwest Comm'n, Inc.*, 870 F.2d 271 (5th Cir. 1989), the Fifth Circuit broadly defined the media's editorial discretion to decide what is "newsworthy" and appropriate for publication. There, a woman who was identified by name as a rape victim in a documentary discussing the crime sued, claiming invasion of privacy. The court affirmed the district court's grant of summary judgment to the journalists, concluding that the intimate details revealed were newsworthy and therefore protected by the First Amendment.

In reaching its conclusion, the Fifth Circuit explained that "judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively." *Id.* at 275. This is because "[e]xuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists." *Id.* Thus, the court adopted a standard for evaluating newsworthiness that follows this Court's mandates in interpreting the First Amendment:

> Here, it is at least arguable, even with the benefit of hindsight, that WCCO was correct in its judgment about the newsworthiness of the victim's identity. That conclusion, although it in no way diminishes the victim's legitimate distress, justifies the district court's grant of summary judgment to defendants.

Id.

The Fifth Circuit has not wavered from its commitment to affording journalists and editors the discretion they need to ensure that a broad array of newsworthy information is published without fear of liability. In *Lowe v. Hearst*, 487 F.3d 246, 251 (5th Cir. 2007), the court affirmed dismissal of an invasion of privacy claim against a newspaper based on its disclosure of information regarding an alleged extortion scheme. The court made clear its rejection of "excessive judicial intervention" which "'foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public.'" *Id.* (citation omitted). The court explained that it "has declined to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were 'substantially related' to the story." *Id.* (citation omitted). It concluded by "declin[ing] to circumscribe the paper's coverage in this case by imposing judicial rules on what is relevant and appropriate in a story that is based on very personal [sic], which became newsworthy by their connection to the alleged crimes." *Id.*

Recent decisions from the Tenth Circuit, like the Fifth Circuit, afford the media broad discretion in deciding what should be published. In *Alvarado v. KOB-TV*, 493 F.3d 1210 (10th Cir. 2007), the court affirmed dismissal of privacy claims filed by two undercover officers whose identities were disclosed in a newscast. That court explained that "courts have not defined the tort of public disclosure of private facts in a way that would obligate a publisher to parse out concededly public interest information ... from allegedly private facts ...." *Id.* at 1221. Rather, courts

"appear to give 'public interest' status to news material on an aggregate basis, rather than itemizing what in the news report would qualify and what could remain private." *Id.* (citation omitted). *See also Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (disclosure of information protected, even if it is highly offensive, "so long as the material as a whole is substantially relevant to a legitimate matter of public concern").

The Ninth Circuit has taken yet another approach. It defers to "community mores" to decide what can be published. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975). There, the court explained that "if there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question, there is room for the jury function." *Id.* at 1130. The court did not resolve the case, remanding to the district court to reconsider its order denying summary judgment to Time, Inc. based on its publication of information about surfing legend Michael Virgil. *Id.* at 1131.c[2]

In contrast, in this case the Eleventh Circuit closely circumscribed the media's discretion to decide what is "newsworthy" and should be published. It embarked on "an intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern – Benoit's murder." 572 F.3d at 1208-1209. The court held that "to properly balance freedom of the press against the right of privacy, *every*

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[2] *Virgil* was cited in dissent in *Florida Star*, 491 U.S. at 552, but remains binding law in the Ninth Circuit today.

private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest." *Id.* at 1212 (citation omitted; emphasis added). Thus it adopted an approach – vastly different from the approaches in the Fifth, Ninth and Tenth Circuits – in which each article facet at issue must be separately evaluated by the court to determine whether it is newsworthy.

B. This Decision Will Affect a Broad Array of Media Entities, Whose Products Rely Heavily on Photographs and Other Types of Images.

Life magazine describes itself as "Your World in Pictures." With print publication spanning seven decades – from 1936 until 2007 – it contained some of the best-remembered photographs of the twentieth century. Its images, which capture moments of history and intimate details of celebrity, became iconic. Teaming with Google, *Life*'s photo archive is now available in its entirety online. And *Life* continues on the Internet, providing the public with modern photos, ranging from "Ethiopa's Vanishing Tribes" to "Inappropriate Behavior on the Red Carpet," and "Suri Cruise, with Mom and Dad." Its business model – text primarily limited to captions for the photographs that dominate *Life*'s pages (and web pages) – makes it unique among magazines and Internet sites. It also serves to emphasize the power and range of information that can be conveyed by a photograph.

Other magazines are less dominated by photography, but it remains a staple of their appeal. *National Geographic* has been published continuously

since 1888 and currently is received by more than fifty million people each month. Regularly recognized and awarded for its photography, its images tell stories in a way that words cannot. In a different genre, *Star* magazine contains any number of pages comprised almost entirely of photographs showing celebrities in a variety of situations. Some are not flattering – the "Best and Worst Beach Bodies" is not kind to some of the celebrities featured there – but all are of interest to its ten million readers. *People*, *US Weekly* and a variety of other magazines offer a similar format to their readers – lots of pictures, many of them taken without the subject's consent, accompanied by short articles or captions describing some event from the subject's life.

Magazines are not alone in their reliance on images to tell a story. The fast-growing gaming industry could not survive without the images that make up its games. Setting aside the many games that are made up entirely of images – such as sports and battle games – a number of games rely heavily on images. Celebrity trivia and travel games would not be the same without pictures of the people and places that provide their content.

In deciding that the photographs at issue here are not newsworthy, the Eleventh Circuit dismissed the significance of images to relay information standing alone. Its deceptively simple analogism would deprive virtually all photography of the protection afforded by the First Amendment. The Court reasoned that while public figures are the proper subject of news reports, "commercialization of their personality" is not protected. The court concluded that the photographs

are not newsworthy because "people are nude every day, and the news media does not typically find the occurrence worth reporting." 572 F.3d at 1209.

This makes no sense. The photograph honored by *National Geographic* on the cover of its "100 Best Pictures" edition is simply a face. It is a striking, haunting face, with green eyes and a fierce visage. The twelve-year-old Afghan girl, then living in a Pakistani refugee camp, could not know that her face would become known to so many. The Eleventh Circuit's reasoning would have deprived this photograph of its First Amendment protection. After all, people's faces are visible every day, "and the news media does not typically find the occurrence worth reporting." Yet, there can be little doubt that the face that twice occupied the cover of *National Geographic* is news, entitled to the protection of the First Amendment against claims of commercial appropriation.

The same is true of the photographs that can be found in *Star*, *People* and *US Weekly*. Many – indeed some of the most popular – photographs reveal everyday activities. Suri Cruise has been a star since she first went out in public, and pictures can be seen almost weekly of Suri and one or both of her parents shopping or playing in a park. A celebrity's favorite Starbucks or Jamba Juice drink – and even the water they drink or gum they chew – may also be a topic of interest. People shop every day, yet these magazines are filled with photographs of celebrities shopping. These photographs are news. The celebrities photographed certainly cannot seek compensation for appropriation of their commercial rights. Yet, the

Eleventh Circuit's reasoning would leave even photographs such as these open to claims.

The court below erred in two fundamental respects, both of which could have a devastating impact on all forms of media. First, the court was wrong in concluding that the photographs, standing alone, are not newsworthy. Perhaps if Ms. Benoit were not a public figure before her death, the Eleventh Circuit's decision might be defensible. But she was a public figure, who had generated tremendous interest in her persona. Ms. Benoit was a flamboyant star, known to many as "Fallen Angel" and then "Woman," who made news with her exploits in wrestling. Her costumes were outlandish, and many, such as the bikinis she frequently wore, were revealing, designed to exploit and capitalize on her sexuality. Wrestling fans loved it. The photographs, standing alone, were newsworthy because of what they revealed (figuratively, and literally) about this striking and outgoing public persona.

Second, the court below erred in concluding that no nexus existed between the photographs and the article they accompanied. Ms. Benoit and her son apparently were killed in a murder suicide by the wrestler Chris Benoit. Her death, like her life, captured the attention of the wrestling world. Particularly given her extravagant personality and the life she led, it is newsworthy that she posed for nude photographs early in her career.

Beyond that, the content of the photographs is newsworthy. *Amicus* submits that it cannot be questioned that an article describing the photographs would be newsworthy. They reveal unique

information about the early life of this celebrity, and what she was, at the time, willing to do to gain fame. Certainly, Ms. Benoit's career capitalized on her confident sexuality, which is apparent in these early photographs. For the very same reasons, the photographs themselves are newsworthy. They provide unique insight into the life of this public figure. The photographs added dimension to the newsworthy article they accompanied, and were newsworthy for that reason, also.

CONCLUSION

The Eleventh Circuit embraced the judicial blue-lining rejected by other circuits when it held that the photographs at issue here are not entitled to the protection of the First Amendment. This Court should resolve this circuit split and establish a broad protection for publishers that rejects liability so long as any argument can be made that the material at issue is relevant to a newsworthy topic. That standard, which should have resulted in a decision for petitioner below, gives the publishers the breathing room demanded by the First Amendment and ensures that they do not suppress newsworthy material out of fear of liability.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Corn-Revere
Counsel of Record
Ronald G. London
DAVIS WRIGHT TREMAINE LLP
Suite 200
1919 Pennsylvania Avenue NW
Washington, D.C. 2006
(202) 973-4200

Rochelle L. Wilcox
DAVIS WRIGHT TREMAINE LLP
Suite 2400
865 S. Figueroa Street
Los Angeles, California 90017
(213) 633-6800

December 28, 2009 *Counsel for Amicus Curiae*